

NJ
8-25

#16-58-24

(SPACE BELOW FOR FILING STAMP ONLY)

ASARO & KEAGY
ATTORNEYS AT LAW
304 KALMA STREET
SAN DIEGO, CALIFORNIA 92101
239-2891

F I L E
Robert D. Zimmet, Clerk
AUG 22 1978
R. TOM, Deputy

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

GREMLIN INDUSTRIES,
a Delaware Corporation,

Plaintiff

vs.

CIRCLE INTERNATIONAL CO.,
INC., etc. et al.,

Defendants.

CASE NO. 416704

POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S
MOTION FOR CHANGE OF VENUE

Date: August 24, 1978
Time: 1:30 p.m.
Place: Department 4

Plaintiff, GREMLIN INDUSTRIES, submits the following
Points and Authorities in Opposition to Defendant's, CIRCLE
INTERNATIONAL COMPANY, Motion for Change of Venue:

1. A CORPORATION OR ASSOCIATION MAY BE SUED
IN THE COUNTY WHERE THE CONTRACT WAS MADE
OR WAS TO BE PERFORMED, OR THE COUNTY WHERE
THE OBLIGATION OR LIABILITY AROSE, OR THE
COUNTY WHERE THE BREACH OCCURRED, OR WHERE
THE PRINCIPAL PLACE OF BUSINESS OF THE
CORPORATION IS SITUATED.

Plaintiff's action against the Defendant, CIRCLE
INTERNATIONAL CO., is grounded upon an oral contract for the
purchase and sale of goods. In cases of oral contracts
where the party being sued is a corporation, venue is proper
where the contract is made or is to be performed. As appears

1 more particularly from the Plaintiff's complaint herein and
2 the counter declarations filed by Plaintiff herein, venue
3 is proper in San Diego County on two bases: (1) that the
4 contract was made in San Diego and (2) that Defendant's
5 obligations under said contract were to be performed in
6 San Diego.

7 Although it is true, as stated in Defendants' Points
8 and Authorities, that the Court must inquire into the nature
9 of the action in determining whether the venue chosen by the
10 Plaintiff in a given action is proper, the Court is not
11 merely limited to the allegations contained in the complaint
12 but may also review those evidentiary matters set forth in
13 any counter declaration filed by the Plaintiff which would
14 amplify the allegations contained in the complaint. As the
15 Court stated in the case of Pacific Airlines, Inc. v. Superior
16 Court, (1965) 231 Cal.App.2d, 587, at page 590:

17 The true rule is that in venue matters, we
18 look at the complaint in determining the nature
19 of the action (citation omitted), where, as in
20 our case, there is no counter affidavit by plaintiff
21 amplifying his complaint.

22 It is further stated in 2 Witkin Cal. Procedure (2d ed.)
23 Section 542 at page 1362:

24 If the complaint alone does not meet the
25 factual challenge of the defendant's affidavit,
26 it may be necessary for the plaintiff to make an
27 additional showing to sustain venue. His right
28 to do it by counter affidavits has long been recog-
nized. As the Court observed in Mills v. Dickson
(1933) 129 CA 728, 732, 19 P. 2d 278 . . . Being
a collateral [motion for change of venue] the proper
means for disposing of a motion is by affidavit and
counter affidavit and the pleader should not be
compelled to anticipate a possible motion and embody
allegations in his complaint that fulfill no other
purpose than to meet a possible move to change the
place of trial.

2. THE ORAL CONTRACT WHICH IS THE SUBJECT OF THIS ACTION WAS MADE OR ENTERED INTO IN SAN DIEGO COUNTY AND THEREFORE VENUE IS PROPER IN SAN DIEGO COUNTY.

The declaration filed in opposition to Defendants' Motion reveals that the oral agreement which is the subject of this action was entered into in San Diego County by and between the President of the Defendant corporation and the President of the Plaintiff at the place of business of the Plaintiff, located at 7030 Convoy Court, San Diego, California, 92117.

The basic rule with respect to the place at which a contract is deemed made is set forth in the case of Bank of Yolo vs. Sperry Flower Company, (1903) 141 Cal. 314 at page 315 where the Court states as follows:

A contract is supposed to be made at some place, and the place where it becomes complete is the place where it is made. . . if the communications are oral. . . the contract should be deemed to have been made in the County where the offer of one is accepted by the other. . .

This rule is further stated in 2 Witken Cal. Procedure (2d ed.) Section 478 at page 1301 as follows:

The basic rule is that the contract is deemed made at the place where the last act necessary for its effectiveness is done.

Therefore, under the foregoing rules, it appears clear in this case that the last act necessary for the effectiveness of the oral contract herein would be the act of the offeree (Defendant herein) assenting to or accepting the offer of the offeror (Plaintiff herein). The declaration of Mr. Fogleman makes it clear that the last act of ~~the~~ corporation necessary for the contract effectiveness, i.e. said Defendant's

1 acceptance of Plaintiff's offer was accomplished in San Diego,
2 California at the place of business of the Plaintiff.

3 Defendant would make it appear from what is contained in
4 its Points and Authorities in Support of its Motion that the
5 last act "necessary for the effectiveness of the contract"
6 (Defendants Points and Authorities at page 5) is the payment
7 by the Defendant corporation of the freight charges in Los
8 Angeles County, California "thus finalizing and effectuating
9 the contract at that location" (Defendants Points and Authorities
10 at page 6).

11 As appears from the citation above quoted, Defendant's
12 conception of the law with respect to the place where a contract
13 is made or entered into for purposes of establishing venue
14 in an action is inaccurate in that the last act necessary for
15 the effectiveness of the contract herein is the acceptance of
16 Plaintiff's offer by the Defendant which was done at Plaintiff's
17 place of business in San Diego and not the place at which
18 Defendant paid the freight charges after the goods had been
19 delivered to the Defendant.

- 20 3. DEFENDANT'S OBLIGATIONS UNDER THE SUBJECT
21 ORAL CONTRACT WERE REQUIRED TO BE PERFORMED
22 IN SAN DIEGO COUNTY AND THEREFORE VENUE IS
23 PROPER IN SAN DIEGO COUNTY.

24 Plaintiff submits that for the reasons set forth in
25 Subsection (2) of its Points and Authorities, herein, Plaintiff
26 has sustained its burden showing that venue is proper in San
27 Diego County. Notwithstanding this however, there is a
28 second basis upon which Plaintiff may bring its action in
San Diego County, in that a suit may also be brought where the

ASARO & KEAGY
ATTORNEYS AT LAW
304 KALAMIA STREET
SAN DIEGO, CALIFORNIA 92101
214-3661

1 subject contract "is to be performed".

2 Plaintiff submits that not only were its obligations
3 under the subject oral contract were to be performed in San
4 Diego County, Defendant's obligations were likewise to be
5 performed in San Diego County and that therefore the place
6 of performance of the subject oral contract is in San Diego
7 County. As appears from the declaration of Plaintiff on
8 file herein, and the invoices attached thereto, the goods
9 which were manufactured for the Defendant herein were delivered
10 to said Defendant f.o.b. Plaintiff's factory in San Diego,
11 California. Plaintiff submits that the invoices are evidence
12 that its obligations under the contract were to be performed
13 in San Diego County since delivery was to be made to Defendants
14 at Plaintiff's place of business in San Diego County. As
15 the Court stated in the case of Gallo vs. Boyle Manufacturing
16 Co., Inc., (1939) 35 Cal. App.2d 168 at page 170:

17 The motion was heard upon the verified complaint
18 and affidavit introduced by both parties. The
19 complaint alleges that Defendant sold and delivered
20 the drums to Plaintiffs f.o.b. Modesto, California.
21 The purchase order in evidence contains the following
22 language: "Please deliver to us via Santa Fe,
23 f.o.b. Modesto, the following items. . ." as
24 delivery of an article sold is an essential part
25 of the contract and as the contract called for
26 delivery in Stanislaus County, it would seem that
27 the foregoing is ample evidence upon which the
28 trial court could make a finding that the
contract was to be performed in that County.
"It is the duty of the seller to deliver the
goods and that the buyer to accept and pay
for them in accordance with the terms of the
contract to sell or sale." (Civ. Code Sec. 1761.)

26 On the basis of the foregoing, it would appear clear that the
27 place of performance of Plaintiff's obligations under the subject
28 oral contract was San Diego, California.

Defendant's obligation under the subject contract was, of course, the payment of money to the Plaintiff for the goods sold and delivered to the Defendant corporation, however, it does not appear that the place of Defendants performance of said obligation was expressly stated. The rule under such circumstances for determining place of performance of Defendant corporation's obligation is set forth in 2 Witkin Cal. Procedure (2d ed.) Section 480 at page 1302:

The place of performance of the promisor's obligation to make payment under an ordinary contract is seldom expressly stated in the agreement. The Court must therefore seek the intention of the parties in the circumstances, aided by two theories: First, the place where the Plaintiff promisee is to perform (by delivering goods or rendering services, etc.) is a likely place for the intended counter performance (payment). Second, under CC 1489 an offer of performance may be made (in the absence of provisions to the contrary) at the place where the Plaintiff creditor (promisee) resides, or has his place of business, or where he may be found.

The declaration of the Plaintiff on file herein and the invoices attached thereto, show that the parties intended that Defendant corporation's obligation for the payment of money for the goods sold and delivered to the Defendant corporation was to be performed by delivering to the Plaintiff at its place of business, in San Diego County, payment within thirty days after delivery of goods.

The case of Blumer vs. Kirkman Corporation, (1952) 38 Cal. 2d 480, was an action wherein the Plaintiff, Blumer sued the Defendant, Kirkman, a corporation, to recover the purchase price of goods sold and delivered. The action was filed where Plaintiff resided in San Francisco, California and alleged

1 that said Plaintiff sold and delivered in Madera County to the
2 Defendant certain quantities of fertilizer for an agreed
3 amount. Plaintiff contended that payment was to be made to
4 him for said goods at his San Francisco office. Defendant
5 brought a motion for change of venue contending that the contract
6 was made in Madera County and that therefore, the action should
7 be brought in said County instead of San Francisco. The
8 Plaintiff, however contended that Kirkman's obligation was
9 to be performed in San Francisco and that therefore, the
10 action was properly filed there. The Court of Appeals in
11 affirming the trial Court's denial of Defendant's motion for
12 change of venue stated at page 484, as follows:

13 The implied conclusion of the trial court also
14 is sustained by viewing the circumstances in the
15 light of pertinent Code. provisions (Hale v. Bohannon,
16 supra; Bank of Yolo v. Sperry Flower Company, 141
17 Cal. 314, 316 [74 P. 855, 65 L.R.A. 90].) Section
18 1500 of the Civil Code, upon which the corporations
19 rely, provides that an offer extinguishes an obli-
20 gation for payment of money if designated additional
21 steps are taken. It does not specify where the offer
22 is to be made. That provision is found in Section
23 1489, and for the reasons stated in Hale v. Bohannon,
24 supra, in the absence of any agreement to the contrary,
25 it was the debtors' duty to pay Blumer in San Francisco
26 or at lease to offer payment there.

27 In the case of Hamilton v. Kyle & Co., (1956) 139 Cal. App.
28 2d 766, the Plaintiff sought to recover sums allegedly due
29 under an oral contract of employment as a salesman of Defendant's
30 products. The action was filed by Plaintiff in Sacramento,
31 California; the place at which Plaintiff was employed by
32 Defendant. The affidavit and pleadings of parties disclosed
33 that, although, Plaintiff was employed by Defendant in its
34 Sacramento office, Defendant's principal place of business

1 was located in Fresno County and that the oral contract was
2 made in Los Angeles County. The Court of Appeals in upholding
3 the trial Court's order denying Defendant's motion for change
4 of venue stated as follows:

5 Whether or not Sacramento County, under the
6 circumstances disclosed by the verified complaint
7 and the affidavits of the parties, was one of the
8 counties designated in the constitutional pro-
9 vision was a factual question for determination
10 by the trial court. [1] It is the rule that under
11 said constitutional provision, insofar as venue is
12 concerned, where the breach complained of is failure
13 to pay money due, the decisive factor is the place
14 where payment is to be made (Hale v. Bohannon, 38
15 Cal. 2d 458, 466 [241 P.2d4]), and a determination
16 of this question is one of fact to be resolved by the
17 trial court. (Gallo v. Boyle Mfg. Co., Inc., 35
18 Cal. App.2d 168, 169 [94 P.2d 1010].) [2] It
19 is the further rule that in the absence of agreement
20 or stipulation to the contrary, the place of perfor-
21 mance in the payment of a debt is the place where
22 the creditor resides or has his place of business.
23 (38 Cal.2d 458, 467; Civ. Code, §§1488 and 1489.)

24 In the instant case, since the declaration of the Plaintiff
25 on file herein reveals that it was the intention of the parties
26 that payment be made at Plaintiff's place of business in San
27 Diego County. It is submitted by the Plaintiff herein that
28 since the obligations of Defendant corporation were to be
performed in San Diego County, venue is proper in San Diego
County as the place where

29 CONCLUSION

30 On the basis of all of the foregoing, it is submitted
31 by the Plaintiff that its declaration on file herein, together
32 with the pleadings conclusively established that venue is proper
33 in San Diego County for the reasons that the subject contract was
34 made in San Diego County and Defendant's obligations under

ASARO & KEAGY
ATTORNEYS AT LAW
305 CALIFORNIA STREET
SAN DIEGO, CALIFORNIA 92101
839-2591

1 said contract were to be performed in San Diego County.

2 It is therefore, respectfully requested that this Court
3 deny Defendant's motion for change in venue.

4 DATED: August 22, 1978

5 ASARO & KEAGY

6
7 By: Patrick J. Olmstead
8 PATRICK J. OLMSTEAD
9 Attorneys for Plaintiff
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28